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Date:

October 14, 2014

Legend

Company =

Group =

Adviser =

Fund A =

Fund B =

Fund C =

State D =

State E =

Date F =

Number g =

Number h =

Number i =

Number j =

Number k =

T =

U =

V =

W =

X =

Y =

Z =

Dear :

This letter is in response to the letter submitted by your authorized representatives dated May 5, 2014, requesting rulings as to whether the insurance company or the contract holders are the owner of shares of Fund A, Fund B and Fund C for federal income tax purposes.

FACTS

Company is organized as a State D corporation. Company is registered as an open-end management investment company with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940, as amended (the 1940 Act). Company's shares are registered with the SEC under the Securities Act of 1933, as amended (the 1933 Act).

Company is comprised of Number j separate investment portfolios. Each portfolio has elected and qualified or intends to elect and qualify to be taxed as a regulated

investment company (RIC) under subchapter M, of Subtitle A, Chapter 1, of the Internal Revenue Code of 1986, as amended. Each investment portfolio is a fund as such term is defined in section 851(g) of the Internal Revenue Code. As such, each Portfolio is treated as a separate corporation for federal income tax purposes pursuant to section 851(g)(1) of the Code.

Each of Funds A, B and C (collectively, Funds) is a newly formed series of Company. Funds use the accrual method of accounting for tax and accounting purposes and have an annual accounting period that ends on Date F. Funds intend to elect and qualify to be taxed as RICs under Subchapter M of Subtitle A, Chapter 1, of the Code. Each Fund will file a federal income tax return on a fiscal year basis with a tax year ending on Date F.

Funds' shares and any beneficial interest in Funds are offered, except as otherwise permitted by section 1.817-5(f)(3) of the Income Tax Regulations, exclusively to separate accounts of life insurance companies for funding of variable annuity contracts and variable life insurance policies (Variable Contracts). The Variable Contracts are variable contracts within the meaning of section 817(d). The life insurance companies whose separate accounts hold, or will hold shares are, or will be, life insurance companies within the meaning of section 816(a). Each segregated account that holds, or will hold Funds' shares is, or will be, a separate account registered with the SEC as a unit investment trust under the 1940 Act or exempt from registration under the 1940 Act. Funds shares are not offered to the general public.

At Funds' inception, Adviser will serve as Funds' investment adviser. Adviser is a corporation organized under the laws of State E and is registered with the SEC as an investment advisor under the Investment Advisers Act of 1940. In accordance with the requirements of Section 15 of the 1940 Act, the duration of the investment advisory agreement between Company and Adviser shall continue in effect for a period of more than Number g years only so long as the continuance is specifically approved at least annually. The continuance must be approved (1) by the vote of a majority of those members of the Board of Directors of Company who are not parties to the investment advisory agreement or interested persons of any such party and by (2) the Board of Directors of Company or by vote of a majority of the outstanding voting securities of Funds.

Adviser currently contemplates that substantially all of Funds' net assets, under normal circumstances, will be invested in the shares of other investment companies, including registered, open-end investment and exchange traded funds, (collectively, the Underlying Portfolios) that invest in the relevant asset classes for each Underlying Portfolio. The Underlying Portfolios consist of investment companies (Variable Funds) that are offered to separate accounts of life insurance companies funding Variable Contracts and investment companies offered to the public (publicly available RICs). (The shares of the Variable Funds may also be held by a "fund of funds," the shares of

which, except as otherwise permitted by section 1.817-5(f)(3), are offered exclusively to separate accounts of life insurance companies funding Variable Contracts.) Each Underlying Portfolio in which a Fund invests has or shall elect and qualify to be taxed as a RIC under Subchapter M of Subtitle A, Chapter 1 of the Code.

The primary investment objective of Fund A is long-term capital appreciation. Fund A will invest, under normal circumstances, at least Number k percent of its assets in shares of the Underlying Portfolios that have either adopted policies to invest at least Number k percent of their assets in T or that will invest substantially all of their assets in T. To diversify its investments, Fund A will invest primarily in a combination of Underlying Portfolios that focus on different segments of U, with less than Number g percent of its net assets invested in V.

The primary investment objective of Fund B is long-term capital appreciation. Fund B will invest, under normal circumstances, at least Number k percent of its assets in shares of Underlying Portfolios that have either adopted policies to invest in at least Number k percent of their assets in W or that invest substantially all of their assets in W. To diversify its investments, Fund B will invest in a combination of Underlying Portfolios that focus on different segments of X, with less than Number h percent of its net assets invested in V.

The primary investment objective of Fund C is total return consisting of current income and capital appreciation. Fund C will invest, under normal circumstances, at least Number k percent of its assets in shares of Underlying Portfolios that have either adopted policies to invest at least Number k percent of their assets in Y or that invest substantially all of their assets in Y. To diversify its investments, Fund C will invest in a combination of Underlying Portfolios that focus on different segments of the Y market, including Z, with less than Number g percent of its net assets invested in V.

Currently only a limited number of Group Variable Funds will provide Funds with exposure to asset classes and segments of the equity and debt markets that will meet their investment objectives. Moreover, in instances where Group Variable Funds exist that meet Funds' investment objectives, a similar Group publicly available RIC also exists, typically with a lower expense ratio. Accordingly, to obtain exposure to certain segments of the asset markets for which the Group's Variable Funds are not available and to more efficiently and effectively achieve its investment objectives, each Fund will invest in a number of publicly available RICs. Funds currently expect to invest to some extent in Variable Funds and the initial investment allocates at least Number i of each Fund's assets to Variable Funds.

Other than Contract Holder's ability to allocate premiums and transfer amounts in insurance company segregated asset accounts to and from those accounts corresponding to Funds, all investment decisions concerning the Funds will be made by Adviser in its sole and absolute discretion. A Contract Holder is not, and will not be,

able to direct a Fund's investment in any particular asset or recommend a particular investment or investment strategy. There is no, and will be no, arrangement, plan, contract or agreement between Adviser and a Contract Holder regarding to a particular investment of any Fund, the availability of any Fund under the Variable Contract or specific assets Funds will hold. No Contract Holder can, or will be able to, communicate directly or indirectly with Adviser concerning the selection, quality, or rate of return on any specific investment or group of investments Funds hold. No Contract Holder will have any legal, equitable, direct or indirect ownership interest in any of Funds' assets or the Underlying Portfolios. Each Contract Holder will only have his or her contract rights under the Variable Contract to receive cash from the insurance company at such times, in such circumstances and in such amounts as are delineated by the terms of the Variable Contract.

A Contract Holder does not have, and will not have any current knowledge of Funds' specific assets other than as may be required under SEC rules to be presented in periodic reports to the Funds' shareholders. Additionally a Contract Holder will not know the specific methodology used, or the specific factors taken into consideration, by Adviser when determining the particular Underlying Portfolios in which the Funds will invest. Further, no Contract Holder will have current knowledge of the specific allocations of Funds' assets among those Underlying Portfolios.

The percentage of a Fund's assets invested in a particular Underlying Portfolio will not be fixed in advance of any Contract Holder's investment and will be subject to change by Adviser at any time without notice to the Contract Holders. Adviser has the right to add or remove Underlying Portfolios and to change the investment allocation percentages in the Underlying Portfolios at any time without notice to the Contract Holders. Adviser will periodically review each Fund's Allocation to the Underlying Portfolios and/or add or remove Underlying Portfolios to the extent Adviser determines that this is desirable.

Each Fund will comply with the diversification requirements of section 817(h) of the Code and section 1.817-5(b) of the regulations.

In addition to the facts presented above, the taxpayers also made the following representations:

- (a) Each Underlying Portfolio intends to continue to qualify for the tax treatment afforded RICs under Part I of Subchapter M of the Code for each of its taxable years.
- (b) Each Fund will elect to be taxed as a RIC under Subchapter M of Subtitle A, Chapter 1, of the Code, and intends to qualify for the tax treatment afforded RICs under the Code for each of its taxable years.

- (c) There is not, and there will not be, any arrangement, plan, contract, or agreement between any future successor to Adviser or subadviser and any Contract Holder regarding Funds' availability under the Variable Contract, or the specific assets Funds or the Underlying Portfolios will hold.
- (d) There is not, and there will not be, any arrangement, plan, contract, or agreement between Group and a Contract Holder regarding the availability of a Group Underlying Portfolio or to the specific assets Funds hold.
- (e) Other than Contract Holders' ability to allocate Variable Contract premiums and transfer amounts in insurance company segregated asset accounts to and from those accounts corresponding to the respective Funds, all investment decisions concerning Funds are, and will be, made by any future successor to Adviser or subadviser in its sole and absolute discretion. The percentage of Funds' assets invested in a particular publicly available RIC will not be fixed in advance of any Contract Holder's investment and will be subject to change by any future successor to Adviser or subadviser at any time.
- (f) Other than a Fund's discretion over the percentage of the assets allocated to the Underlying Portfolios, all investment decisions of its assets allocated to the Group's Underlying Portfolios will be made by Group, any subadviser to the Group Underlying Portfolios and the Group Underlying Portfolios' Boards of Directors in their sole and absolute discretion.
- (g) A Contract Holder cannot, and will not be able to, direct a Fund's investment in any particular assets or recommend a particular investment or investment strategy, and there is not, and will not be, any agreement or plan between any future successor to Adviser or subadviser and a Contract Holder regarding a particular investment of the Funds.
- (h) There is not, and will not be, any agreement or plan between Group and a Contract Holder regarding a particular investment of the Group Underlying Portfolios.
- (i) No Contract Holder can, or will be able to, communicate directly or indirectly with any future successor to Adviser or subadviser concerning the selection, quality or rate of return on any specific investment or group of investments Funds hold.
- (j) No Contract Holder can, or will be able to communicate directly or indirectly with Group concerning the selection, quality or rate of return on any specific investment or group of investments held by the Group Underlying Policies.

Ruling Requested

Funds request a ruling that Funds' investment in publicly available RICs will not cause the Contract Holders to be treated as the owners of shares in Funds for federal income tax purposes.

Law

Section 61(a) provides that the term "gross income" means all income from whatever source derived, including gains derived from dealings in property, interest and dividends.

A long standing doctrine of taxation provides that "taxation is not so much concerned with the refinement of title as it is with actual command over the property taxed – the actual benefit for which the tax is paid." Corliss v. Bowers, 281 U.S. 376 (1930).

The incidence of taxation attributable to ownership of property is not shifted if the transferor continues to retain significant control over the property transferred, Frank Lyon Company v. United States, 435 U.S. 561 (1978); Commissioner v. Sunnen, 333 U.S. 591 (1948); Helvering v. Clifford, 309 U.S. 331 (1940), without regard to whether such control is exercised through specific retention of legal title, the creation of a new equitable but controlled interest, or the maintenance of effective benefits through the imposition of a subservient agency. Christoffersen v. United States, 749 F.2d 513 (8th Cir 1984).

Rev. Rul. 77-85, 1977-1 C.B.12, considers a situation in which the individual purchaser of a variable annuity contract retained the right to direct the customer of the account supporting that variable annuity to sell, purchase and exchange securities or other assets held in the custodial account. The purchaser also was able to exercise an owner's right to vote account securities either through the custodian or individually. The Internal Revenue Service (the "Service") concluded that the purchaser possessed "significant incidents of ownership" over the assets held in the custodial account. The Service reasoned that if a purchaser of an "investment annuity" contract may select and control the investment assets in the separate account of the life insurance company issuing the contract, then the purchaser is treated as the owner of those assets for federal income tax purposes. Thus, any interest, dividends or other income derived from the investment assets are included in the purchaser's gross income.

In Rev. Rul. 80-274, 1980-2 C.B. 27, the Service, applying Rev. Rul. 77-85, concluded that, if a purchaser of an annuity contract may elect and control the certificates of deposit supporting the contract, then the purchaser is considered the owner of the certificates of deposit for income tax purposes. Similarly, Rev. Rul. 81-225, 1981-2 C.B. 12, concludes that investments in mutual fund shares to fund annuity contracts are considered to be owned by the purchaser of the annuity contract if the mutual fund

shares are available for purchase by the general public. Rev. Rul. 81-225 also concludes that, if the mutual fund shares are available only through the purchase of an annuity contract, then the sole function of the funds to provide an investment vehicle that allows the issuing insurance company to meet its obligations under its annuity contracts and the mutual fund shares are considered to be owned by the insurance company. Finally, in Rev. Rul. 82-54, 1982-1 C.B. 11, the purchaser of certain annuity contracts could allocate premium payments among three funds that had an unlimited right to reallocate value among the funds prior to the maturity date of the annuity contract. Interests in the funds were not available for purchase by the general public, but were instead only available through the purchase of an annuity contract. The Service concluded that the purchaser's ability to choose among general investment strategies (for example, between stock, bonds or money market instruments) either at the time of the initial purposes or subsequent thereto, did not constitute control sufficient to cause the contract holders to be treated as the owners of the mutual fund shares.

In Christoffersen v. United States, supra, the Eighth Circuit considered the federal tax consequences of the ownership of shares supporting a segregated asset account. The taxpayers in Christoffersen purchased a variable annuity contract that reflected the investment return and market value of assets held in an account that was segregated from the general asset account of the issuing insurance company. The taxpayers had the right to direct that their premium payments be invested in any one of six publicly traded mutual funds. The taxpayers could reallocate their investment among the funds at any time. The taxpayers also had the right upon seven days' notice to withdraw funds, surrender the contract, or apply the accumulated value under the contract to provide annuity payments.

The Eighth Circuit held that, for federal income tax purposes, the taxpayers, not the issuing insurance company, owned the mutual fund shares that funded the variable annuity. The court concluded that the taxpayer surrendered few of the rights of ownership or control over the assets of the subaccount that supported the annuity contract. According to the court, "the payment of annuity premiums, management fees and the limitation of withdrawals to cash [did] not reflect a lack of ownership or control as the same requirements could be placed on traditional brokerage or management accounts." Thus, the taxpayers were required to include in gross income any gains, dividends or other income derived from the mutual fund shares.

Section 817, which was enacted by Congress as part of the Deficit Reduction Act of 1984 (Pub. L. No 98-369) (the "1984 Act"), provides rules regarding the federal income tax treatment of variable life and annuity contracts. Section 817(d) of the Code defines a "variable contract" as a contract that provides for the allocation of all or part of the amounts received under the contract to an account that, pursuant to state law or regulation, is segregated from the general asset accounts of the company and that provides for the payment of annuities, or is a life insurance contract. In the legislative history of the 1984 Act, Congress expressed its intent to deny life insurance treatment

to any variable contract if the assets supporting the contract include funds publicly available to investors.

The conference agreement allows any diversified fund to be used as the basis of variable contracts so long as all shares of the funds are owned by one or more segregated asset accounts of insurance companies, but only if access to the fund is available exclusively through the purchase of a variable contract from an insurance company ... In authorizing Treasury to prescribe diversification standards, the conferees intend that the standards be designed to deny annuity or life insurance treatment that are publicly available to investors...

H.R. Conf. Rep. No. 98-861, at 1055 (1984).

Section 817(h)(1) of the Code provides that a variable contract based on a segregated asset account shall not be treated as an annuity, endowment, or life insurance contract unless the segregated asset account is adequately diversified in accordance with regulations prescribed by the Secretary of the Treasury. If a segregated asset account is not adequately diversified, income earned by the segregated asset account is treated as ordinary income received or accrued by the policyholders.

Approximately two years after the enactment of section 817(h), the Treasury Department issued proposed and temporary regulations prescribing the minimum level of diversification that must be met for an annuity or life insurance contract to be treated as a variable contract within the meaning of section 817(d). The preamble to the temporary regulations stated as follows:

The temporary regulations ... do not provide guidance concerning the circumstances in which investor control of the investments of a segregated asset account may cause the investor, rather than the insurance company, to be treated as the owner of the assets in the account. For example, the temporary regulations provide that in appropriate cases a segregated account asset may include multiple subaccounts, but do not specify the extent to which policyholders may direct their investments to particular sub-accounts without being treated as owners of the underlying assets. Guidance on this and other issues will be provided in regulations or revenue rulings under section 817(d), relating to the definition of variable contracts.

51 Fed. Reg. 32633 (Sept. 15, 1986)

With certain revisions not relevant here, the final regulations adopted the text of the temporary regulations.

In Rev. Rul. 2003-91, 2003-2 C.B. 347, a variable contract holder did not have control over segregated account assets sufficient for the Service to deem the variable contract holder the owner of the assets. The variable contracts at issue were funded by a separate account that was divided into twelve (12) subaccounts. The issuing insurance company could increase or decrease the number of subaccounts at any time, but there would never be more than twenty (20) subaccounts available under the contracts. Each subaccount offered a different investment strategy. Interests in the subaccounts were available solely through the purchase of a variable life or annuity contract that qualified as a variable contract under section 817(d). The investment activities of each were managed by an independent investment adviser. There was no arrangement, plan, contract, or agreement between the contract holder and the independent investment adviser regarding the availability of a particular subaccount, the investment strategy of any subaccount, or the assets to be held by a particular subaccount. Other than a contract holder's right to allocate premiums and transfer funds among the available subaccounts, all investment decisions concerning the subaccounts were made by the issuing insurance company or the independent investment adviser in their sole and absolute discretion. A contract holder had no legal, equitable, direct or indirect interest in any of the assets held by a subaccount. A contract holder had only a contractual claim against the issuing insurance company to collect cash in the form of death benefits or cash surrender values under the contract. The Service concluded that, based on all of the facts and circumstances, the contract holder did not have direct or indirect control over the separate account or any subaccount asset, and therefore the contract holder did not possess sufficient incidents of ownership over the assets supporting the variable contracts to be deemed the owner of the assets for federal income tax purposes.

The Service's position explained in the Revenue Rulings above is that if a variable life insurance or variable annuity contract holder possesses sufficient incidents of ownership over the assets supporting the policy or contract, the contract holder is viewed as the owner of the underlying assets for federal income tax purposes. As a result, the contract holder is currently taxed on any income or gains attributable to the underlying assets. The Service stated in Rev. Rul. 2003-91 that the determination of whether the holder of a variable life insurance policy or variable annuity contract possesses sufficient incidents of ownership over the assets of the separate account underlying the variable life insurance contract or variable annuity contract depends on all the relevant facts and circumstances.

Section 4982(a) imposes a tax on every regulated investment company for each calendar year equal to 4 percent of the excess (if any) of – (1) the required distribution for such calendar year, over (2) the distributed amount for such calendar year.

Section 4982(f) provides an exception from such excise tax as follows:

This section shall not apply to any regulated investment company for any calendar year if at all times during such calendar year each shareholder in such company was either - (1) a trust described in section 401 and exempt from tax under section 501(a), (2) a segregated asset account of a life insurance company held in connection with variable contracts (as defined in section 817(d)), (3) any other tax-exempt entity whose ownership of beneficial interests in the company would not preclude the application of section 817(h)(4), or another (4) regulated investment company described in this subsection.

For purposes of the preceding sentence, any shares attributable to an investment in the regulated investment company (not exceeding \$250,000) made in connection with the organization of such company shall not be taken into account.

Analysis

In the present case, the fact that Funds may invest in Public Funds does not cause the Variable Contract holders to be treated as the owners of Funds' shares for income tax purposes. In Rev. Rul. 82-54, the amounts held in the segregated asset account underlying a variable contract were invested as the contract holder directed in shares of any or all of three open-end investment companies (mutual funds). Each mutual fund represented a different, general investment strategy. Shares of the mutual funds were available only to insurance company segregated asset accounts. While the mutual funds themselves were not available to the general public, the mutual funds held common stocks, bonds and money market instruments, all of which were available for purchase by members of the general public. The public availability of the assets held by the mutual funds did not lead to the conclusion that the issuing insurance company was simply a conduit between the contract holders and their mutual funds or the underlying assets of the mutual funds. Rev. Rul. 82-54 held that the insurance company, not the contract holders, was the owner of the mutual fund shares.

Similar to the mutual funds in Rev. Rul. 82-54, Funds' shares are, or will be, available only to insurance company segregated assets accounts and will invest in assets that are available to the general public. In the current case, instead of investing in common stocks, bonds and money market instruments that are available to the general public, Funds will, generally, invest in RIC funds, some of which are available to the general public. Based on the representations and facts presented by Funds, the Contract Holders in this case do not appear to have any more control over the assets held under their contract than was the case in Rev. Rul. 82-54. In addition, it is not likely that the general public can replicate the overall performance of Funds given the Adviser's discretion and authority to change the investment within Funds at any time. Further, it should be noted that at the Underlying Portfolio level there is another investment adviser making decisions as to what should be the proper mix of investments at that level which would appear to make any attempted replication of the Funds more difficult.

Conclusion

Based on the representations Funds have provided, Funds do not represent an indirect means of allowing a Contract Holder to invest in a public fund. Accordingly, the Funds' investment in publicly available RICs will not cause the Contract Holders to be treated as owners of the shares of the Funds for federal income tax purposes.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this ruling letter.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Powers of Attorney on file in this office, copies of this letter are being sent to your authorized representatives. The rulings contained in this letter are based upon information and representations submitted by the taxpayers and accompanied by penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

SARAH E. LASHLEY
Assistant to the Branch Chief
Branch 4
Office of the Associate Chief Counsel
(Financial Institutions & Products)

cc: